

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE**

WEAVER'S COVE ENERGY, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL
ZONE MANAGEMENT,

Respondent.

MILL RIVER PIPELINE, LLC

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL
ZONE MANAGEMENT,

Respondent.

**REPLY IN FURTHER SUPPORT OF THE MOTION OF
THE CITY OF FALL RIVER FOR LEAVE TO FILE A SINGLE
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT**

The City of Fall River, Massachusetts ("Fall River") respectfully submits this reply in further support of its motion for leave to file a single *amicus curiae* brief in support of Respondent, and in reply to the Joint Response of Weaver's Cove Energy, LLC ("WCE") and Mill River Pipeline, LLC ("MRP") (collectively "Appellants") in Opposition to the Motion of the City of Fall River to file an *Amicus Curiae* Brief in Support of Respondent ("Joint Response").

I. Fall River's *Amicus Curiae* Brief Raises Issues of Importance to the Secretary's Review, and Should Be Considered.

At the outset, Fall River wants to clarify that it has no objection to Appellants "having the last word" and welcomes Appellants' acknowledgement that they bear the burden of proof in these matters. *See* Joint Response at 4, 6.¹ Fall River has no objection to the inclusion of briefing on the matters raised by Fall River in the yet-to-be issued briefing schedule related to the supplemental record references already admitted and being considered. *See* January 2, 2008 decision allowing supplementation of the decision record by inclusion of the U.S. Coast Guard Denial Letter of Recommendation issued October 24, 2007; January 10, 2008 stay of the briefing schedule to consider further record supplementation.² Indeed, there was nothing untoward about the timing of Fall River's amicus filing, Fall River was aware of the pending request to supplement the record and set a briefing schedule, and had been waiting for those rulings before completing its brief. However, when the rulings were not issued in January, Fall River proceeded to complete and file its brief.

Appellants' thinly-veiled and obviously defensive attempt to preclude the Secretary from reviewing Fall River's arguments, which arguments were based upon the decisional record assembled at the Federal Energy Regulatory Commission ("FERC") and the Massachusetts Office of Coastal Zone Management ("MCZM" or "Respondent"), as supplemented by judicial proceedings which are a matter of public record, should be rejected. While it is true Fall River advances arguments not previously raised by MCZM, these arguments, nonetheless, address

¹ *See also* 15 C.F.R. §§ 930.121, 930.127(f); Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Company, LLC ("Islander East Consistency Decision"), May 5, 2004, at 35 (preponderance of the evidence); Decision and Findings of the U.S. Secretary of Commerce in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil Oil Consistency Decision"), Sept. 2, 1994, at 8 ("the Appellant bears the burden of proof and the burden of persuasion").

² To the extent additional time is needed to consider additional information, including supplemental record references and briefing, the Secretary may stay the close of the decisional record for up to sixty (60) days pursuant to 15 C.F.R. § 930.130(2) as it did recently in the case of AES Sparrows Point LLC and Mid-Atlantic Express LLP. *See* 73 Fed. Reg. 8647 (Feb. 14, 2008).

matters directly relevant to the considerations the Secretary must balance in reaching his override decision, including specifically whether the Project is consistent with the objectives or purposes of the Coastal Zone Management Act. Given that MCZM likewise will have an opportunity for supplemental briefing based on the January 2 and 10 orders, it can comment on Fall River's arguments.³

Moreover, there is nothing in the Energy Policy Act of 2005, Pub. L. No. 109-58, 19 Stat. 594 (2005) ("EPAAct"), and recent amendments to the National Oceanic and Atmospheric Administration ("NOAA") regulations, eliminating the public comment period for energy projects, 15 C.F.R. § 930.128, which bars consideration of Fall River's *amicus curiae* brief. The EPAAct should not be used as a basis to deny consideration of Fall River's brief in this appeal because it was enacted after the record before FERC was closed.⁴ Moreover, as indicated, briefing is not yet complete so Fall River's brief is timely. Lastly, Fall River's interest in this case was previously established. Nothing in either the EPAAct or NOAA's regulations suggests that by eliminating the public comment period, Congress or NOAA intended to eliminate the right to participate as an *amicus curiae* previously established in the Secretary's decisions.

More importantly, as described in Fall River's brief, Appellants cannot demonstrate a basis for overriding MCZM's objection. They cannot show compliance with the conditions precedent to operation of the FERC Certificate, and therefore cannot show the Project furthers the national interest in a significant and substantial manner. Although Appellants apparently question the relevancy of the matters raised by Fall River, *see* Joint Response at 5, compliance

³ Appellants argue disingenuously that Fall River should be denied the opportunity to submit its brief because it raises new arguments, *see* Joint Response at 4-5, while simultaneously claiming that to the extent it raises similar arguments, Fall River's motion for leave to file its *amicus* likewise should be denied because it is not making a "unique contribution." *Id.* at 5 n.2. Such chicanery should be rejected.

⁴ FERC issued its decision on July 15, 2005, 112 FERC ¶ 61,070, before the EPAAct was signed into law on August 8, 2005.

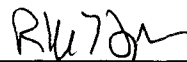
with the FERC conditions impacts FERC's "public interest" finding upon which Appellants rely in their initial briefs.⁵ Additionally, these conditions all relate directly to adverse coastal effects, including, without limitation, substantial *unresolved* concerns related to the significant dredging impacts. See Conditional Order at ¶ 106; Rehearing Order at ¶ 18. Therefore, these considerations are important to the Secretary's decision and should not be ignored. Appellants are simply afraid that the Secretary will find Fall River's arguments persuasive. Thus, they claim "undue prejudice."

II. Conclusion

For the foregoing reasons, and the reasons set forth in its initial motion, Fall River respectfully requests that its *amicus curiae* brief be accepted.

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⁵ Appellants claim erroneously that FERC's conditions related to safety, security and emergency response apply only to *commissioning* of the terminal. See Joint Response at 5. Rather, as described in Fall River's brief, these conditions must be satisfied before the *viability* of the Project can be determined. See *Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 112 FERC ¶ 61,070 (July 15, 2005) at ¶¶ 95-99, WCE A-3; MRP A-4, *order on reh'g*, 114 FERC ¶ 61,058 (Jan. 23, 2006) ("Rehearing Order") at ¶¶ 99, 108-109, WCE A-4; MRP A-5, *rev. denied by, Fall River v. Fed. Energy Regulatory Comm'n*, 507 F.3d 1, 7 (1st Cir. 2007).

CERTIFICATE OF SERVICE

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